IN THE

Supreme Court of the United States

October Term, 1968

No. [redacted] 30

WILLIE CARTER SR., JOHN HEAD, REV. PERCY MCSHAN,
Appellants,

—v.—

JURY COMMISSION OF GREENE COUNTY, ALABAMA, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

JURISDICTIONAL STATEMENT

JACK GREENBERG
NORMAN C. AMAKER
JAMES N. FINNEY
10 Columbus Circle
New York, New York 10019

ORZELL BILLINGSLEY, JR.
1630 Fourth Avenue, North
Birmingham, Alabama 35203

Attorneys for Appellants

INDEX

Table of Authorities

Cases: PAGE

PAGE

Federal Statutes:

State Statutes:

Other Authorities:

IN THE

Supreme Court of the United States

October Term, 1968

No. .....

WILLIE CARTER SR., JOHN HEAD, REV. PERCY MCSHAN,

Appellants,

—v.—

JURY COMMISSION OF GREENE COUNTY, ALABAMA, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

JURISDICTIONAL STATEMENT

Appellants appeal from the final judgment of the United States District Court for the Northern District of Alabama entered September 13, 1968, refusing to declare Alabama Code, Title 30, Sections 4 and 21 unconstitutional on their face because of vagueness and as applied and to enjoin their operation and enforcement, and further refusing to declare the all-white jury commission of Greene County, Alabama unconstitutional. This statement is submitted to show that this Court has jurisdiction of the appeal and that substantial questions are presented.

Opinion Below

The opinion of the District Court for the Northern District of Alabama is as yet unreported and is set forth in

the Appendix, p. 1a, *infra.* (Hereinafter, references to the Appendix will be designated by A.)

Jurisdiction

This is an action for injunctive and declaratory relief in which the jurisdiction of a District Court of three judges was invoked under 28 U.S.C. §§1331, 1343, 2201, 2202, 2281, 2283 and 2284, and under 42 U.S.C. §1981 to vindicate and enforce rights of the plaintiffs guaranteed by the due process and Equal Protection Clauses of the Fourteenth Amendment alleged to be violated by a statute of the State of Alabama (Title 30, §21) governing the qualifications of jurors and by the practice of selecting only white jury commissioners by the State's Governor pursuant to Title 30, §§9 and 10, Code of Alabama (1958), as amended.

The final judgment of the Court below entered September 13, 1968, *inter alia,* adjudged that there is systematic exclusion of Negroes from jury rolls of Greene County, Alabama, by reason of purposeful discrimination and enjoined the jury commission, its clerk, and agents from such exclusion. However, the Court upheld the constitutionality of the challenged statutory provisions against plaintiffs' prayer that they be declared unconstitutional on their face.

Notice of Appeal on behalf of appellants Carter, Head, McShan, and the class they represent was timely filed on November 7, 1968. A certified copy of the record from the district court was filed in this court on December 16, 1968 and the Clerk has been advised that it will serve as the basis for this appeal and the separate appeal of three other plaintiffs in the district court relating to other issues.[1]

---

[1] That appeal was docketed here on Dec. 11, 1968 as *Bokulich* v. *Jury Commission of Greene Co.,* No. 1255 Misc. O.T. 1968.

Receipt of the record was acknowledged by the office of the Clerk of the Court December 17, 1968.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1253 to review the judgment of the three-judge district court denying, after notice and hearing, interlocutory and permanent injunctive relief against the enforcement of the statutes of the State of Alabama on the ground that they violate the Federal Constitution. See, e.g., *Idlewild Bon Voyage Liquor Corporation* v. *Epstein*, 370 U.S. 713 (1962).

Constitutional and Statutory Provisions Involved

The primary statutory provision involved in this litigation is Code of Alabama Tit. 30, Section 21, as amended Sept. 12, 1966 which reads as follows:

> "The jury commission shall place on the jury roll and in the jury box the names of all citizens of the County who are generally reputed to be honest and intelligent and are esteemed in the community for their integrity, good character and sound judgment; but no person must be selected who is under twenty-one or who is an habitual drunkard, or who, being afflicted with a permanent disease or physical weakness is unfit to discharge the duties of a juror; or cannot read English or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English and has all the other qualifications prescribed herein and is a freeholder or householder his name may be placed on the jury roll and in the jury box. No person over the age of sixty five years shall be registered to serve on a jury or to remain on the panel of jurors unless willing to do so. When any female shall have been summoned for jury duty she shall

have the right to appear before the trial judge, and such judge, for good cause shown shall have the judicial discretion to excuse said person from jury duty. The foregoing provision shall apply in either regular or special venire."

The following additional provisions are material to an understanding of the issues presented: Code of Alabama, Tit. 30, Sections 9, 10, 18, 20, 24 and 30. These enactments are set out in full in the Appendix at pp. 29a-32a, *infra*.

This action also involves the Fourteenth Amendment to the Constitution of the United States.

Questions Presented

1. Whether Code of Alabama, Title 30 §21 is unconstitutionally vague in violation of the Fourteenth Amendment because its requirement that jurors be persons "who are generally reputed to be honest and intelligent and are esteemed in the community for their integrity, good character and sound judgment" provides Alabama jury officials with the opportunity to discriminate on racial and other grounds, an opportunity shown by the record to have been resorted to in this case?

2. Whether Alabama's practice of appointing only white persons to serve as jury commissioners violates the Fourteenth Amendment where the all-white jury commissioners customarily resort to the opportunity to discriminate provided by statute or are so unrepresentative of a cross-section of the community, particularly a community with a majority black population, that they fail to produce jury rolls reflecting that cross-section?

Statement

A. Introduction

This civil action challenging the constitutionality of Alabama's juror selection statute on its face and as applied arises from Greene County, Alabama, the locus of *Coleman* v. *Alabama*, 377 U.S. 129 (1964) (Coleman I); 389 U.S. 22 (1967) (Coleman II). It was initiated by Paul M. Bokulich, Willie Carter, Sr., John Head, and Rev. Percy McShan. Paul Bokulich was in 1966 when he was arrested and charged with grand larceny, a white civil rights worker associated with the Southern Christian Leadership Conference. Arrested at the same time as Bokulich and also charged with grand larceny were George Greene and Hubert G. Brown, both Negro civil rights workers. Before filing this action, Bokulich obtained an order from the Court of Appeals for the Fifth Circuit enjoining and restraining the prosecution of the criminal action. Since the action involved a claim of the unconstitutionality of statutes of the state of Alabama, it was appropriately tried by a federal district court of three judges. 28 U.S.C. §§2281, 2284. George Greene and Hubert Brown subsequently joined in the civil action as plaintiffs-intervenors.

Appellants Carter, Head and McShan are Negro citizens and residents of Greene County, and joined in this action as plaintiffs on behalf of themselves individually and as representatives of a class consisting of all potentially eligible Negro jurors of Greene County who are excluded from such service because of their race.

As to plaintiff Bokulich, and plaintiffs-intervenors Greene and Brown, the Court below held that the discriminatory exclusion of Negroes from the grand jury constituted a violation of both equal protection and due process (A-20a).

In considering relief to be granted, however, the Court held:

> The normal and most appropriate method for Bokulich, Brown and Greene to raise the composition of the jury roll and the operation of the jury selection system is in criminal prosecutions in the state courts, if indictments issue. (A-22a).

The court thus refused to continue in effect the stay of the state criminal prosecutions. They have taken a separate appeal to this court from the district court's refusal to enjoin their state court prosecutions. (*Bokulich, et al.* v. *Jury Commission of Greene Co., Ala., et al.*, No. 1255 Misc. O.T. 1968.)

With respect to plaintiffs Carter, Head and McShan and the class they represent, the Court below held:

> . . . that Negro citizens of Greene County are discriminatorily excluded from consideration for jury service, in violation of the equal protection clause of the Fourteenth Amendment, and Title 30, §21 has been unconstitutionally applied to as them. (A-20a).

They, the Court continued, ". . . are entitled to an injunction against discriminatory exclusion of Negroes from consideration for jury service in Greene County." (A-21a). In the implementation of the holding, defendants were ordered to "take prompt action to compile a jury list for Greene County, Alabama . . . [and] to file with this [District] court within sixty days a jury list as so compiled, showing thereon the information required by Title 30, §20, Code of Alabama (1958), as amended, plus the race of each juror, and if available the age of each juror, and a report setting forth the procedures, system and method by which said list was compiled. . . ." (A-27a).

But the Court refused to declare §21 unconstitutional on its face (A-26a) and refused to declare the county jury commission unconstitutionally constituted (A-27a), and it is from this portion of the order and judgment that this appeal is taken.

B. Selection Process of Jury Commissioners and Jurors

The standards and procedure for selecting jury Commissioners and Jurors are contained in Code of Alabama, Title 30.

Each county has a jury commission comprised of three members appointed by the Governor. The Commission is charged with the duty of preparing a jury roll containing the names of every citizen living in the county who possesses the prescribed qualifications and who is not exempted by law from serving on juries.

The selection process contemplated by the statute operates in two stages. First there is the collection of names of substantially all persons potentially eligible for jury service. The clerk of the Circuit Court may be employed as clerk of the Commission, Title 30, §15, and in Greene County was so employed. Title 30, §18 directs the clerk of the commission to obtain the name of every citizen of the county over twenty-one and under sixty-five. Sources from which such names are to be collected are contained in Title 30, §24, which directs the commission, through its clerk, to scan the registration lists, the tax assessor's lists, any city directories and telephone directories "and any and every source of information from which he may obtain information, and to visit every precinct at least once each year."

The second stage involves application of the statutory qualifications to the general pool of potential jurors so

selected. "The jury commission . . . shall make in a well bound book a roll containing the name of every citizen living in the county who possesses the qualifications herein prescribed and who is not exempted by law from serving on juries." Title 30, §20.

A qualified juror is one who is "generally reputed to be honest and intelligent . . . and esteemed in the community for [his] integrity, good character and sound judgment." Title 30, Section 21.

In Greene County, the clerk of the commission did not obtain the names of all potentially eligible jurors as provided by §18. She testified below that she never prepared a list of all potentially eligible persons between the ages of 21 and 65 (T. 93).* Everyone on the jury roll is considered qualified and remains on the roll unless he dies or moves away (T. 148). New names are added to the old roll. Both the clerk and the jury commissioners secure names of persons suggested for consideration as new jurors.

In securing the new names, the clerk testified that she did not use the tax assessor's list (T. 111), that she did not use all available telephone directories (T. 100), and that she did not know the reputation of most of the Negroes in the county (T. 138). She visits each of the eleven beats in the county annually and talks with persons she knows to secure names (Yarborough, Deposition, p. 13). The names suggested to her and to the commissioners by Negroes in the community are accepted without further investigation to see that they meet the qualifications necessary (T. 136-137).

The commissioners, who exercise their subjective judgment in applying these qualifications, are appointed pursu-

* ("T." references are to the transcript of the trial below).

ant to statute. Title 30, §10 provides that they are to be appointed by the governor. Title 30, §9 requires the commissioners so appointed to "be persons reputed for their fairness, impartiality, integrity and good judgment."

In practice, the Jury Commissioners appointed in Greene County are now and, as far as appellants have been able to ascertain have always been, entirely white (T. 88). They share with the clerk the responsibility for adding new names to the general pool. Their procedures are even less formalized than the clerk's. The commissioners "ask around" for names of possible jurors usually in the area of the county in which they reside (T. 183). At the August 1966 meeting one commissioner was new and submitted no names (T. 143). Another had been ill and unable to seek many names at all (T. 142). The third could remember only one Negro name that he suggested (Gray Deposition, p. 17).

Thus in practice, as the court below noted, "the system operate[s] exactly in reverse from what the state statutes contemplate." (A-12a) It produces a small group of individually selected or recommended names for consideration, provided by white administrators and citizens with limited contact with the Negro community. No meaningful procedure exists for the inclusion of Negro names.

Evidence produced at the trial below established that although approximately 74% of the male population of Green County over 21 years of age was Negro, at no time during the period from 1961 to 1966 did the percentage of Negroes on the jury roll exceed 19% (Summary of Evidence, R.132).

The 1961 jury roll was 95% white, 5% Negro. Before the extraordinary session of January 1967, it had become 81% white, 19% Negro (Summary of Evidence, R.132).

After the extraordinary session, in which women were added to the roll for the first time, it was 68% white, 32% Negro (Summary of Evidence, R.132). This is to be contrasted with the estimate of population at that time of 65% Negro and 35% white (A-15a).

Appellants contend that this gross disparity resulted not only from the discriminatory administration of the statutes as the district court found but principally from the vague statutory standards for juror qualification which invested the all white jury commissioners with sufficient discretion to permit them to discriminate on racial grounds.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I.

Code of Alabama, Title 30, §21 Is Unconstitutionally Vague Because It Permits the Arbitrary Exclusion of Negroes From Service As Jurors In Violation of the Fourteenth Amendment to the Constitution of the United States.

Alabama's statutory standards for prospective jurors are vague. Jury Commissioners must select only those persons:

> "generally reputed to be honest and intelligent . . . and . . . esteemed in the community for their integrity, good character and sound judgment." Code of Ala., Tit. 30, §21.

In numerous cases involving a variety of rights, this Court has declared similar statutory or regulatory language permitting public officials to make subjective decisions unconstitutionally vague: *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81 (1921); economic regulation legislation:

"Unreasonable Charges"; *Baggett* v. *Bullitt*, 377 U.S. 360 (1964), due process: "subversive person"; *Herndon* v. *Lowry*, 301 U.S. 242 (1937), free speech and assembly: "insurrection"; *Winters* v. *New York*, 333 U.S. 507 (1948), due process and freedom of the press: "obscene".

In *Staub* v. *City of Baxley*, 355 U.S. 313 (1958), the Court applied the rule to an ordinance which prohibited soliciting without a license from the mayor and city council who, in passing upon the application were to consider the character of the applicant. Similarly, a statute requiring a certificate of "good moral character" as a prerequisite to college admission was invalidated by the Fifth Circuit. *Board of Supervisors* v. *Ludley*, 252 F.2d 372 (5th Cir. 1958), *cert. denied*, 358 U.S. 819 (1958).

Because Alabama's statutory qualifications are vague, they furnish jury commissioners with an opportunity to discriminate on a variety of grounds. *Cf. Whitus* v. *Georgia*, 385 U.S. 545, 552 (1967); *Bostick* v. *South Carolina*, 386 U.S. 479 (1967).

In the hands of all-white jury commissioners, against the backdrop of the racial history of the state and region, Alabama's vague statutory standards provide an opportunity to discriminate on racial grounds. *Cf. Louisiana* v. *United States*, 380 U.S. 145 (1965); *Davis* v. *Schnell*, 81 F. Supp. 872 (S.D. Ala.), aff'd *per curiam*, 336 U.S. 933 (1949). In *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966), this Court, at pp. 312-313 said:

> "... the good morals requirements is so vague and subjective that it has constituted an open invitation to abuse at the hands of voting officials."

The record in this case shows that the opportunity to discriminate racially has been resorted to in Greene County. Statistics in the record show:

1960 Census, Greene County
Persons over 21 Years of Age

	White	% *White*	*Negro*	% *Negro*
Male	775	26%	2,247	74%
Female	874	24%	2,754	76%
Total	1,649		5,001	

Composition of Jury Rolls
1961-65 (Males Only)[2]

Year	*White Males on Jury Rolls*	*% of 1960 Pop. (White Males)*	*Negro Males on Jury Rolls*	*% of 1960 Pop. (Negro Males)*
1961	337	43%	16	0.7%
1962	348	45%	26	1%
1963	349	45%	28	1%
1964	—		—	
1965	382	49%	47	2%
1966	389	50%	82	4%

(A-14a)

The statistics post-1964 are particularly pertinent for they reflect the jury commission's performance subsequent to a declaratory judgment by the district court directing that the jury selection system be administered in a racially nondiscriminatory way. *Coleman* v. *Barton*, No. 63-4 (N.D. Ala. June 10, 1964 (A-3a).[3] In 1967 the number of whites on the jury roll was increased to 810 or 49% of the 1960 census figures for adult whites. Negroes on the roll in-

[2] Until 1966 Alabama restricted jury service to males. See *White* v. *Crook*, 241 F.Supp. 401 (M.D. Ala. 1966); Code of Ala. (Supp. 1967) Tit. 30, §21.

[3] Subsequently, in a direct review of Coleman's murder conviction, this Court held that an unrebutted *prima facie* case of systematic racial exclusion in jury selection in Greene County had been established. *Coleman* v. *Alabama*, 389 U.S. 22 (1967).

creased to 388 or 7½% of the 1960 census figure for Negro adults.[4]

The Court below found that the practice of racial discrimination in jury selection had continued but limited its relief to an injunction against discriminatory administration of the Alabama statute (A-27a), thus leaving untouched the vague statutory standards which, by lodging excessive discretion in the hands of the all-white jury commissioners, are chiefly accountable for the result of racially discriminatory jury selection in Greene County and elsewhere in the state.

This relief was clearly inadequate. As the Fifth Circuit has said: "It is this broad discretion located in a non-judiciary office which provides the source of discrimination in the selection of juries." *Labat* v. *Bennett*, 365 F.2d 698, 713 (5th Cir. *en banc* 1966); see also *Smith* v. *Texas*, 311 U.S. 128 (1940); *Rabinowitz* v. *United States*, 366 F.2d 34 (5th Cir. *en banc* 1966). Just four years ago the selection practices of the Greene County jury commission were declared racially discriminatory and ordered discontinued, but as the record shows, the practices have persisted. They have persisted principally because Alabama's statutory scheme permitted white jury officials to continue finding almost no Negroes who in their judgment could meet the intelligence and character standards of the statute. *Coleman* v. *Barton, supra.*

---

[4] There was testimony at the trial below that by 1967, through migration of Negroes, the population ratio for all Negroes and all whites had decreased to 65%-35%. In its opinion, the Court said:

"Assuming that this change was reflected in the numbers of adults as in non-adults, and that the number of adult whites remained approximately constant, then the approximate number of adult Negroes in the county (male and female) had declined from 5001 to 3065, of whom approximately 12½% were on the rolls in 1967 after the January special meeting." (A-15a).

Because Title 30, §21 is of state-wide applicability, it is not surprising that the problem exposed in Greene County is not restricted to it, but is state-wide. Civil suits successfully challenging racially discriminatory jury selection have been brought in federal district courts in counties throughout the state of Alabama. See, e.g., *Dennard, et al.* v. *Baker*, C.A. 2654-N (M.D. Ala. 1968) (Barbour County); *Hadnott, et al.* v. *Narramore*, C.A. 2681-N (M.D. Ala. 1968) (Autauga County); *McNab, et al.* v. *Griswold*, C.A. 2653 (M.D. Ala. 1968) (Bullock County); *Palmer, et al.* v. *Steindorff*, C.A. 2679-N (M.D. Ala. 1968) (Butler County); *Bush, et al.* v. *Woolf*, C.A. 68-206 (N.D. Ala. 1968) (Calhoun County); *Good, et al.* v. *Slaughter*, C.A. 2677-N (M.D. Ala. 1968) (Crenshaw County); *Banks, et al.* v. *Holley*, C.A. 735-E (M.D. Ala. 1967) (Tallapoosa County); *Turner* v. *Spencer*, 261 F.Supp. 342 (S.D. Ala. 1966) (consolidated from cases which arose in Perry, Hale and Wilcox Counties); *Mitchell* v. *Johnson*, 250 F. Supp. 117 (M.D. Ala. 1966) (Macon County); *White* v. *Crook*, 241 F.Supp. 401 (M.D. Ala. 1966) (Lowndes County); *Reese, et al.* v. *Pickering*, C.A. 3839-65 (S.D. Ala. 1968 (Dallas County).

Similar cases have been initiated and are pending in the following counties: *Huff, et al.* v. *White*, C.A. 68-223-N (M.D. Ala.) (Bibb County); *Palmer, et al.* v. *Davis*, C.A. 967-S (M.D. Ala.) (Dale County); *Jones, et al.* v. *Holliman*, C.A. 3944-65 (S.D. Ala.) (Marengo County); *Preston, et al.* v. *Mandeville*, C.A. 5059-68 (S.D. Ala.) (Mobile County); *Richardson, et al.* v. *Wilson*, C.A. 68-300 (N.D. Ala.) (Jefferson County); *Jones, et al.* v. *Wilson*, C.A. 66-92 (N.D. Ala.) (Jefferson County), pending on appeal *sub nom Salary* v. *Wilson* (No. 25978, 5th Cir.).

These cases impose a heavy burden on already crowded court dockets, however their necessity will continue until jury selection throughout the state is made on the basis of

objective standards. This has been the response of Congress with respect to invidious discrimination in federal jury selection,[5] and in the area of voting rights.[6]

Until there are objective standards to guide the discretion of jury selectors in Alabama an effective cure to problems of racially disproportionate jury rolls is unlikely.[7]

---

[5] 28 U.S.C. §1865: Qualifications for Jury Service

. . .

(b) In making such determination [i.e., juror qualifications], the chief judge of the district court, or such other district court judge as the plan may provide, shall deem any person qualified to serve on grand and petit juries in the district court unless he—

(1) is not a citizen of the United States twenty-one years old who has resided for a period of one year within the judicial district;

(2) is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;

(3) is unable to speak the English language;

(4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or

(5) has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

[6] Voting Rights Act of 1965 (42 U.S.C. §1973 et seq.).

[7] See Kuhn, "Jury Discrimination: The Next Phase," 41 U.S.C. Law Rev. 235, 266-82 (1968); Note, "The Congress, The Court and Jury Selection: A Critique of Titles I and II of the Civil Rights Bill of 1966," 52 Va. L.Rev. 1069, 1140-56 (1966).

II.

The Jury Commission of Greene County Is Unconstitutionally Constituted Because It Perpetuates Racially Discriminatory Juror Selection In Violation of the Fourteenth Amendment to the Constitution of the United States.

The non-objective standards of juror qualification are a crucial element in racially discriminatory juror selection, as appellants have urged. An equally crucial and interrelated element is the racial composition of Alabama's jury commissions.

Jury commissions are appointed by the Governor. (Code of Ala., Tit. 30, §10); members are required to be persons "reputed for their fairness, impartiality, integrity and good judgment." Code of Ala. (Supp. 1967) Tit. 30, §9.

The Court below held that "the attack on the racial composition of the commission fails for want of proof." (A-20a). However, the record established by compelling inference the causal relationship between the all-white characteristic of the Greene County jury commission, the excessive statutory discretion and the resulting racial discrimination in selection.

Assuming the sincere impartiality of all-white jury commissioners "in the reality of the segregated world," (*Brooks* v. *Beto*, 366 F.2d 1, 12 (5th Cir. *en banc*, 1966)), the likelihood that they would normally be in a position to know very many Negroes who are "generally reputed to be honest and intelligent . . . and esteemed in the community for . . . integrity, good character and sound judgment," is slight. Also, given the reality of that world, Negroes generally are regarded by white jury officials as incapable of meeting those standards.

The Clerk of the Greene County commission testified that for the previous eleven years all of the commissioners had been white (T.88). It is judicially noticeable that a Negro has never been appointed to a jury commission in the state of Alabama. There was also evidence that the clerk and the three members of the jury commission (one of whom was seriously ill and another who was new to the commission and had not yet participated in selection) were almost totally unfamiliar with the Negro community and relied instead on only eight Negroes and fourteen whites for recommendations. In fact, the Clerk and one commissioner used the same Negro for recommendations (T.182).

The too-discretion-giving provisions of §21 (Code of Ala. Tit. 30) are a vice no matter by whom administered,[8] but certainly in the context of racially segregated southern society, excessive discretion in the hands of all-white officials is fatal to Negro participation in jury service as it was in voting. *Louisiana* v. *United States, supra; South Carolina* v. *Katzenbach, supra.*

Thus so long as the statutory standards of selection remain unchanged, it is of crucial importance that a jury commission be representaive of the *whole* community in which it functions. *Brooks* v. *Beto, supra.* Particularly must this be so with respect to communities like Greene in which Negroes constitute so large a majority of the residents.

---

[8] The provisions of §21 would allow the continued exclusion of most of the eligible Negroes by virtue of the fact that its provisions could be misapplied by Negro appointees deemed to be "safe". *Cf. Brooks* v. *Beto, supra,* Judge Wisdom, concurring opinion.

CONCLUSION

For the foregoing reasons probable jurisdiction should be noted.

Respectfully submitted,

.....

Jack Greenberg
Norman C. Amaker
James N. Finney
10 Columbus Circle
New York, New York 10019

Orzell Billingsley, Jr.
1630 Fourth Avenue, North
Birmingham, Alabama 35203

Attorneys for Appellants

APPENDIX

APPENDIX

Opinion by Godbold, C.J.

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ALABAMA,

WESTERN DIVISION

Civil Action No. 66-562

PAUL M. BOKULICH, WILLIE CARTER, SR., JOHN HEAD, REV. PERCY MCSHAN, on their own behalf and on behalf of all others similarly situated,

Plaintiffs,

—and—

GEORGE GREENE and HUBERT G. BROWN,

Intervenors-Plaintiffs,

—v.—

JURY COMMISSION OF GREENE COUNTY, ALABAMA, WALTER MORROW, ALBERT GRAY, and MELVIN DURRETTE, as members of the Jury Commission of Greene County, Alabama, MARY C. YARBOROUGH, as Clerk of the Jury Commission of Greene County, Alabama, E. F. HILDRETH, as Circuit Judge for the 17th Judicial District of Alabama, T. H. BOGGS, as District Attorney for Greene County, Alabama, RALPH BANKS, JR., as County Attorney for Greene County, Alabama, and LURLENE B. WALLACE, as Governor of the State of Alabama,

Defendants.

Opinion by Godbold, C.J.

Before GODBOLD, Circuit Judge, and GROOMS and ALLGOOD, District Judges.

GODBOLD, Circuit Judge:

This suit is an attack on the jury system of Greene County, Alabama. The plaintiffs charge that there is systematic exclusion of Negroes from grand and petit juries by reason of purposeful discrimination, in violation of the Constitution of the United States and the Constitution of the State of Alabama. They charge that Tit. 30, §§4 and 21 of the Code of Alabama (1958) establishing qualifications for jurors are, on their face and as applied, in violation of the Fourteenth Amendment to the Constitution of the United States. And they claim that the all-white jury commission of Greene County is unconstitutionally constituted.

Both declaratory and injunctive relief are sought. Jurisdiction of this court is invoked under 28 U.S.C. §1343 and 42 U.S.C.A. §1983. A three-judge court has been convened pursuant to 28 U.S.C.A. §2281. Notice of the suit has been given to the Attorney General and Governor of Alabama as required by 28 U.S.C.A. §2284(2).

The court has considered the evidence consisting of oral testimony, testimony by deposition, numerous exhibits, and stipulations of the parties, and pursuant to Fed. R. Civ. P. 52 makes and enters in this opinion the appropriate findings of fact and conclusions of law.

Each plaintiff sues on his own behalf and, pursuant to Fed. R. Civ. P. 23, on behalf of a class of those similarly situated. Plaintiff Paul Bokulich is a white civil rights worker associated with the Southern Christian Leadership Conference. He was arrested in Greene County and charged with two counts of grand larceny. His arrest followed soon after a sharply-contested primary election in which Negroes were successful candidates for county

office. Plaintiffs Willie Carter, Sr., John Head and Rev. Percy McShan are Negro residents of Greene County who allege that they are qualified under the laws of Alabama to serve as jurors in the Circuit Court of Greene County and desire to serve but never have been summoned for jury service. Plaintiffs-intervenors George Greene and Hubert G. Brown are Negro civil rights workers for the Student Non-Violent Coordinating Committee. While working in Greene County in connection with the general election to be held in November 1966 they were arrested on charges of grand larceny.

Temporary restraining orders have been granted against presentation to the Greene County grand jury of charges against Bokulich, Greene and Brown.

The defendants are the members and the clerk of the Greene County jury commission, the Circuit Judge and District Attorney of the state judicial circuit in which Greene County is located, the County Attorney, and the then Governor of Alabama.

The claim of systematic exclusion of Negroes from the Greene County jury roll has been in the courts before. *Coleman* v. *Barton,* No. 63-4, N.D. Ala., June 10, 1964, was a suit against the members and clerk of the jury commission. The district judge granted a declaratory judgment but on grounds of comity declined to grant injunctive relief. Pertinent extracts from the judgment then entered are as follows:

> "1. The Jury Commission of Greene County, Alabama, is under a statutory duty of seeing that the names of every person possessing the qualifications to serve as jurors, and not exempt by law from jury duty, be placed on the jury roll and in the jury box of said County.

"2. The Clerk of the Jury Commission of Greene County, Alabama, is under a duty to comply with Section 24 of Title 30 of the Code of Alabama, 1940, to visit every precinct in Greene County at least once a year to enable the Jury Commission to properly perform its duties as Commissioners as required by law.

"3. The jury commissioners of Greene County, Alabama, are under a duty to familiarize themselves with the qualifications of eligible jurors without regard to race or color.

"4. The jurors be selected and the roll made up and the box filled on the basis of individual qualifications and not as a member of a race.

"5. No person otherwise qualified be excluded from jury service because of his race.

"6. The Commission not pursue a course of conduct in the administration of its office which will operate to discriminate in the selection of jurors on racial grounds.

"7. In making up and establishing the jury roll and in filling the jury box mere symbolic or token representation of Negroes will not meet the constitutional requirements and that numerical or proportional limitations as to race are forbidden.

"8. The jury roll and the jury box as presently constituted be examined for compliance with these standards and the declaration herein made."

Contemporaneously the same Coleman was making his way through the state courts, and the United States Supreme Court, on a direct appeal from a conviction of

murder in Greene County.[1] The conclusion of the United States Supreme Court in its second opinion, 389 U.S. 22, 88 S.Ct. 2, 19 L.Ed. 2d 22, was that Coleman had established a prima facie case of denial of equal protection by systematic exclusion of Negroes from Greene County juries, and the state had not adduced evidence sufficient to rebut the prima facie case.

1. Standing.

Brown and George Greene are Negroes, charges against whom are proposed to be submitted to the grand jury. Their standing to sue is apparent. Bokulich does not lack standing because he is white. *Rabinowitz* v. *United States*, 366 F.2d 34 (5th Cir. 1966); *Labat* v. *Bennett*, 365 F.2d 698 (5th Cir. 1966); *United States* v. *Hunt*, 265 F. Supp. 178 (W.D. Tex., 1967); *Allen* v. *State*, 110 Ga. App. 56, 137 S.E. 2d 711 (1964); *State* v. *Lowry*, 263 N.C. 536, 139 S.E. 2d 870 (1965).[2]

---

[1] Coleman v. State, 276 Ala. 513, 164 So. 2d 704 (1963), *rev'd*, 377 U.S. 129, 84 S.Ct. 1152, 12 L.Ed. 2d 190 (1964), remanded after reversal to trial court for hearing on motion for new trial, 276 Ala. 518, 164 So. 2d 708 (per curiam), 280 Ala. 509, 195 So. 2d 800 (affirming trial court's denial of motion for new trial), *rev'd*, 389 U.S. 22, 88 S.Ct. 2, 19 L.Ed. 2d 22 (1967) (per curiam), judgment affirming trial court vacated, conviction annulled and remanded with direction to quash the indictment, Nov. 27, 1967, unpublished order, Ala. Sup. Ct. (2d Div. 487).

[2] Murphy v. Holman, 242 F. Supp. 480 (M.D. Ala. 1965), Blauvelt v. Holman, 237 F. Supp. 385 (M.D. Ala. 1964), Hollis v. Ellis, 201 F. Supp. 616 (S.D. Tex. 1961), and **Alexander v. State, 160** Tex. Crim. App. 460, 274 S.W. 2d 81, *cert. denied* 348 U.S. 872, 75 S.Ct. 108, 99 L.Ed. 686 (1954), hold that a white man may not raise the issue of exclusion of Negroes from the jury. In none of those cases was there shown to be substantial identity of interest or concern of the complaining party with the group alleged to be ex-

Head was shown to meet standards for jurors established by Alabama law.[3] We find that he represents the interests of a class composed of Negro citizens of Greene County qualified under state law for jury service, entitled to be considered for such service, and in such consideration to have applied to them non-discriminatory standards and procedures, and as such he has standing to sue. *Billingsley* v. *Clayton,* 359 F.2d 13 (5th Cir.), *cert. denied* 385 U.S. 841, 87 S.Ct. 92, 17 L.Ed. 2d 74 (1966); *White* v. *Crook,* 251 F. Supp. 401 (M.D. Ala. 1966); *Mitchell* v. *Johnson,* 250 F. Supp. 117 (M.D. Ala. 1966); *Brown* v. *Rutter,* 139 F. Supp. 679 (W.D. Ky. 1956).

2. The selection methods of the jury commission.

There is a jury commission of three members in each county appointed by the governor. The clerk of the Circuit Court may be employed as clerk of the commission, Tit. 30, §15, and in Greene County was so employed. The commission is charged with the duty of preparing a jury roll containing the name of every citizen living in the county who possesses the prescribed qualifications and who is not exempted by law from serving on juries. Tit.

---

cluded. We are concerned with the essential realities of the situation. The case in which the complaining party is of the same racial group as that alleged to be excluded is the clearest instance of potential violation of equal protection, but it does not set the outer limits of equal protection guarantees or of the right to complain of violations thereof. Nor does the "same class" theory limit due process, the requirements of basic fairness of trial and the integrity of the fact finding process. In the exclusion of an identifiable class from jury service equal protection and due process merge. Labat v. Bennett, supra; United States ex rel. Goldsby v. Harpole, 263 F.2d 71, 81 (5th Cir. 1959).

[3] There was no such proof as to McShan and Carter.

30, §§20, 21 and 24. Tit. 30, §21 prescribes the qualifications and is quoted in the margin.[4]

The statutory scheme for the selection process begins with the names of substantially all persons potentially eligible for jury service and that group then is narrowed to exclude those not eligible. Sec. 18 provides:

> The clerk of the jury commission shall, under the direction of the jury commission obtain the name of every citizen of the county over twenty-one and under sixty-five years of age and their occupation, place of residence and place of business, and shall perform all such other duties required of him by law under the direction of the jury commission.[5]

This section, as well as §§20 and 21, was amended by Act No. 285, Acts of Alabama, Special Session 1966, p. 428, adopted September 12, 1966, so as to embrace all citizens rather than male citizens only.

---

[4] "Section 21. The jury commission shall place on the jury roll and in the jury box the names of all citizens of the county who are generally reputed to be honest and intelligent and are esteemed in the community for their integrity, good character and sound judgment; but no person must be selected who is under twenty-one or who is an habitual drunkard, or who, being afflicted with a permanent disease or physical weakness is unfit to discharge the duties of a juror; or cannot read English or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English and has all the other qualifications prescribed herein and is a freeholder or householder his name may be placed on the jury roll and in the jury box. No person over the age of sixty-five years shall be required to serve on a jury or to remain on the panel of jurors unless willing to do so. When any female shall have been summoned for jury duty she shall have the right to appear before the trial Judge, and such Judge, for good cause shown, shall have the judicial discretion to excuse said person from jury duty. The foregoing provision shall apply in either regular or special venire."

[5] Under §21 persons over the age of 65 are not required to serve but may do so if willing.

The commission is directed to require the clerk to scan the registration lists, the tax assessor's lists, any city directories and telephone directories "and any and every source of information from which he may obtain information, and to visit every precinct at least once each year." Tit. 30, §24.

Necessarily there are two steps in the selection of jurors for the jury roll. First there must be a selection of persons to be considered, i.e., the persons to whom the commissioners are to apply the statutory qualifications. Then the criteria of the statutes must be applied to those who are up for consideration.[5a] The end product of the system established by the Alabama legislature is placing on the jury roll the names of all adult persons who are qualified and not exempted. "The jury commission * * * shall make in a well bound book a roll containing the name of every citizen living in the county who possesses the qualifications herein prescribed and who is not exempted by law from serving on juries." Tit. 30, §20. "The jury commission shall place on the jury roll and in the jury box the names of all citizens of the county who are generally reputed (etc.)." Tit. 30, §21. "The jury commission is charged with the duty of seeing that the name of every person possessing the qualifications prescribed in this chapter to serve as a juror and not exempted by law from jury duty, is placed on the jury roll and in the jury box." Tit. 30, §24. These directions of the statute have been reaffirmed by the Supreme Court of Alabama:

[5a] "The sole purpose of these requirements [of the full list directed by §18, and use of the sources of information directed by §24 to be considered] is to insure that the jury commissioners will have as complete a list as possible of names, compiled on an objective basis, from which to select qualified jurors." Mitchell v. Johnson, 250 F. Supp. 117, 123 (M.D. Ala. 1966).

> The first step [in obtaining jurors to serve on grand and petit juries] is to get only qualified men on the jury roll. That is those having the qualifications prescribed by law and not exempt. The names of all such men in the county should be placed on the roll and in the jury box each year.

Fikes v. *State,* 263 Ala. 89, 95, 81 So. 2d 303, 309 (1955), *rev'd on other grounds,* 352 U.S. 191, 77 S.Ct. 281, 1 L.Ed. 2d 246 (1957), and by the Court of Appeals of Alabama, *Inter-Ocean Casualty Co.* v. *Banks,* 32 Ala. App. 225, 23 So. 2d 874 (1945). Failure to put on the roll the name of every qualified person may not be the basis for quashing an indictment or venire absent fraud or a denial of constitutional rights, *Fikes* v. *State, supra,* at 96, 81 So. 2d at 309, but substantial compliance with these legislative safeguards established to protect litigants and to insure a fair trial by an impartial jury is necessary in order to safeguard the administration of justice. *Inter-Ocean Casualty Co.* v. *Banks, supra.*

The manner is which the system actually works in Greene County is generally as follows. The clerk does not obtain the names of all potentially eligible jurors as provided by §18, in fact was not aware that the statute directed that this be done and knew of no way in which she could do it. The starting point each year is last year's roll. Everyone thereon is considered to be qualified and remains on the roll unless he dies or moves away (or, presumably, is convicted of a felony). New names are added to the old roll. Almost all of the work of the commission is devoted to securing names of persons suggested for consideration as new jurors. The clerk performs some duties directed toward securing such names. This is a part-time task, done

without compensation, in spare time available from performance of her duties as clerk of the Circuit Court. She uses voter lists but not the tax assessor's lists. Telephone directories for some of the communities are referred to, city directories not at all since Greene County is largely rural.

The clerk goes into each of the eleven beats or precincts annually, usually one time. Her trips out into the county for this purpose never consume a full day. At various places in the county she talks with persons she knows and secures suggested names. She is acquainted with a good many Negroes, but very few "out in the county." She does not know the reputation of most of the Negroes in the county. Because of her duties as clerk of the Circuit Court the names and reputations of Negroes most familiar to her are those who have been convicted of crime or have been "in trouble." She does not know any Negro ministers, does not seek names from any Negro or white churches or fraternal organizations. She obtains some names from the county's Negro deputy sheriff.

The commission members also secure some names, but on a basis no more regular or formalized than the efforts of the clerk. The commissioners "ask around," each usually in the area of the county where he resides, and secure a few names, chiefly white persons.[6] Some of the names are obtained from public officials, substantially all of whom are white.

---

[6] The commissioner who concentrates on four precincts in the south of the county could not say that he visited each of those precincts in the year August 1965-August 1966. The commissioner who had been concentrating on the northern precincts had been ill in August 1966, and his participation in affairs of the commission around that time is acknowledged to have been nominal.

One commissioner testified that he asked for names and that if people didn't give him names he could not submit them.[7] He accepts pay for one day's work each year, stating that he does not have a lot of time to put on jury commission work. The same commissioner considered that Negroes are best able to judge which Negroes are good and outstanding citizens and best qualified for jury service, that the best place to get information about the Negro citizen is from Negroes. He takes the word of those who recommend people, checks no further and sees no need to check further, considering that he is to rely on the judgment of others.[7a] He makes no inquiry or determination whether persons suggested can read or write, although §21 excludes persons who cannot read English. Neither commissioners nor clerk have any social contacts with Negroes or belong to any of the same organizations.

Through its yearly meeting in August, 1966, the jury commission met once each year usually for one day, sometimes for two, to prepare a new roll.[8] New names presented by clerk and commissioners, and some sent in by letter, were considered. The clerk checked them against

---

[7] A portion of his testimony was as follows:

Q. And these are the four precincts you provided names for? A. That I sort of worked around.

Q. Am I also correct you could not find any list that you submitted to the jury commission? A. I couldn't find them when they wouldn't submit them to me.

Q. Pardon A. They were not submitted; there was no way for me to find them: I asked for them, and that is all I could do; if they don't send them, I can't submit them.

[7a] The clerk testified that if one recommending another for jury duty did not know the reputation of the person recommended there was no way for her to find it out.

[8] An annual meeting is required to be held between August 1 and December 20. Tit. 30, §20.

court records of felony convictions. New names decided upon as acceptable were added to the old roll. The names of those on the old roll who had died or moved away were removed.

At the August, 1966 meeting one commissioner was new and submitted no names, white or Negro, and merely did clerical work at the meeting. Another had been ill and able to seek names little if at all. The third could remember one Negro name that he suggested. This commissioner brought the name, or names, he proposed on a trade bill he had received, and after so using it threw it away. All lists of suggested names were destroyed. As a result of that meeting the number of Negro names on the jury roll increased by 37. (Approximately 39 were added but it is estimated that two were lost by death or removal outside the country.) Approximately 32 of those names came from lists given the clerk or commissioners by others. The testimony is that at the one day August meeting the entire voter list was scanned. It contained the names of around 2,000 Negroes.

Thus in practice, through the August, 1966 meeting the system operated exactly in reverse from what the state statutes contemplate. It produced a small group of individually selected or recommended names for consideration. Those potentially qualified but whose names were never focused upon were given no consideration. Those who prepared the roll and administered the system were white and with limited means of contact with the Negro community. Though they recognized that the most pertinent information as to which Negroes do, and which do not, meet the statutory qualifications comes from Negroes there was no meaningful procedure by which Negro names were fed into the machinery for consideration or effectual means

of communication by which the knowledge possessed by the Negro community was utilized. In practice most of the work of the commission has been devoted to the function of securing names to be considered. Once a name has come up for consideration it usually has been added to the rolls unless that person has been convicted of a felony. The function of applying the statutory criteria has been carried out only in part, or by accepting as conclusive the judgment of others, and for some criteria not at all.

Testimony that most of the emigration out of the county is by younger and better educated Negroes, tending to leave in the county those older and illiterate, proves little in the overall picture. In late 1966 there were at least an estimated 2,000 Negroes on the voting rolls.[9] The minimum voting age in Alabama is 21. It cannot be presumed that all of these adults, or anywhere near all, were over age 65, which in any event is a basis for excuse and not exclusion, or were unable to read English and not freeholders. (In any event it appears that the requirement of ability to read English has been the subject of little inquiry.)

The grand jury panel which met and would have considered the charges against Bokulich had it not been enjoined consisted of ten whites and eight Negroes. The racial composition of a single drawn jury panel cannot cure the disparity on the roll or the deficient system by which the roll is set up and maintained.

In January, 1967, after this suit was filed, an extraordinary session of the jury commission was held. Part of its work was to add females to the jury list, as a result of

---

[9] Between November 8, 1965 and August 16, 1966 federal voting registrars registered approximately 1800 to 1900 Negroes as voters in Greene County.

the September, 1966, amendments by the Alabama legislature extending jury service to women. The procedure for obtaining names to be added to the list, including the names of Negroes, was the same as that previously employed. There is evidence that more persons, including more Negroes, were asked for suggestions than in the past, but the system remained the same.[10]

3.

We turn to consideration of the statistical results produced by the operation of the system.

1960 Census, Greene County,
Persons over 21 Years of Age

	White	*% White*	*Negro*	*% Negro*
Male	775	26%	2,247	74%
Female	874	24%	2,754	76%
Total	1,649		5,001	

Composition of Jury Rolls,
1961-65 (Males Only)

Year	*White Males on Jury Rolls*	*% of 1960 Pop. (White Males)*	*Negro Males on Jury Rolls*	*% of 1960 Pop. (Negro Males)*
1961	337	43%	16	0.7%
1962	348	45%	26	1%
1963	349	45%	28	1%
1964	—		—	
1965	382	49%	47	2%
1966	389	50%	82	4%

[10] "[T]he mere change in state law, whose previous commands had already been consciously ignored, did not remove the central

Opinion by Godbold, C.J.

The January, 1967 meeting of the jury commission increased the number of whites and Negroes, a substantial part of the increase coming from inclusion of females for the first time. Whites on the roll increased to 810, which was 49% of the 1960 census figure for adult white males and females. Negroes on the roll increased to 388, which was 7½% of the 1960 census figure for adult Negro males and females. There was testimony that by 1967, through migration of Negroes, the population ratio for all Negroes and all whites had decreased to 65%-35%. Assuming that this change was reflected in the numbers of adults as in non-adults, and that the number of adult whites remained approximately constant, then the approximate number of adult Negroes in the county (male and female) had declined from 5001 to 3065, of whom approximately 12½% were on the rolls in 1967 after the January special meeting. Recognizing the assumptions and approximations involved that prevent exact figures, the disparity is nevertheless evident, for at the same time approximately half of the adult whites (male and female) were on the rolls, a continuation of the previous practice of maintaining on the roll approximately half of the eligible white population.

In 1961 the jury roll was 95% white, 5% Negro. Before the extraordinary session of January 1967 it had become 81% white, 19% Negro. After the extraordinary session it was 68% white, 32% Negro. This is to be contrasted with the estimate of population at that time of 65% Negro and 35% white.

---

issue of the pattern and practice of racial discrimination. The change of merely one of the sources or tools of the conduct did not demonstrate a change in the conduct itself." Pullum v. Greene, 5 Cir. 1968, 396 F.2d 251, 254 (5th Cir. 1968).

The discriminatory administration of jury selection laws fair on their face achieving a result of exclusion of Negroes from juries has been a violation of the Fourteenth Amendment for almost 100 years. *Neal* v. *Delaware,* 103 U.S. 370, 26 L.Ed. 567 (1881). Discrimination in the selection of grand juries has been the basis for reversal of state criminal convictions since 1883. *Bush* v. *Kentucky,* 107 U.S. 110, 1 S.Ct. 625, 27 L.Ed. 354 (1883).

> It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government. We must consider this record in the light of these important principles. The fact that the written words of a state's laws hold out a promise that no such discrimination will be practiced is not enough. The Fourteenth Amendment requires that equal protection to all must be given—not merely promised.

Smith v. *Texas,* 311 U.S. 128, 130, 61 S.Ct. 164, 165, 85 L.Ed. 84, 86 (1940).

The Constitution does not require representation of a litigant's race on the jury panel which tries his case, *Bush* v. *Kentucky, supra.* It does not demand that the jury roll or venire be a perfect mirror of the community or accurately reflect the proportionate strength of every identifiable group. *Swain* v. *Alabama,* 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed. 2d 759 (1965). It does require that there be no

systematic exclusion of Negroes on account of race from participation as jurors in the administration of justice.[11]

The statistical results produced by the system employed in Greene County, and the testimony of those who administer the system, establish that there is invalid exclusion of Negroes on a racially discriminatory basis. The *modus operandi* of the selection system, as described by those in charge of it, rather than satisfactorily explaining disparities reaffirms what the figures show, that there has been followed "a course of conduct which results in discrimination 'in the selection of jurors on racial grounds.'" [12] *Davis* v. *Davis,* 361 F.2d 770 (5th Cir. 1966); *United States ex rel. Seals* v. *Wiman,* 304 F.2d 53 (5th Cir. 1962); *White* v. *Crook, supra.*

The Constitution casts upon jury commissioners, as judicial administrators, affirmative duties which must be carried out in order to have a constitutionally secure system. —*Cassell* v. *Texas, supra,* at 289, 70 S.Ct. at 633, 94 L.Ed. at 848. "When the commissioners were appointed as judicial administrative officials, it was their duty to fa-

---

[11] Discrimination against Negroes is not the only factor producing imbalances in jury selection which may be unconstitutional. Prior to its recent amendment the provisions of Tit. 30, §21, quoted supra, denying women the right to serve on juries, was held unconstitutional. White v. Crook, supra. Exclusion of persons of identifiable national origin (Mexican-Americans) has been struck down. Hernandez v. Texas, 347 U.S. 475, 74 St.Ct. 667, 98 L.Ed. 866 (1954). Maryland has held invalid discrimination on religious grounds. Schowgurow v. State, 240 Md. 121, 213 A.2d 475 (1965). Those of low economic status have been kept off the rolls. E.g., Labat v. Bennett, supra. California has disciplined a prosecuting attorney who assisted the jury commissioner in eliminating defense-prone jurors from the jury rolls. Noland v. State Bar, 63 Cal.2d 298, 405 P.2d 129 (1965).

[12] Akins v. Texas, 325 U.S. 398, 403, 65 S.Ct. 1276, 1279, 89 L.Ed. 1692, 1696 (1945).

miliarize themselves fairly with the qualifications of the eligible jurors of the county without regard to race and color. They did not do so here, and the result has been racial discrimination. We repeat the recent statement of Chief Justice Stone in Hill v. Texas, 316 US 400, 404, 86 L ed 1559, 1562, 62 S Ct 1159:

'Discrimination can arise from the action of commissioners who exclude all negroes whom they do not know to be qualified and who neither know nor seek to learn whether there are in fact any qualified to serve. In such a case, discrimination necessarily results where there are qualified negroes available for jury service.' "

—*Avery* v. *Georgia,* 345 U.S. 559, 561, 73 S.Ct. 891, 892, 97 L.Ed. 1244, 1247 (1953): "The Jury Commissioners, and the other officials responsible for the selection of this panel, were under a constitutional duty to follow a procedure—'a course of conduct'—which would not 'operate to discriminate in the selection of jurors on racial grounds.' Hill v. Texas, 316 US 400, 404, 86 L ed 1559, 1562, 62 S Ct 1159 (1942). If they failed in that duty, then this conviction must be reversed—no matter how strong the evidence of petitioner's guilt."

—*United States ex rel. Seals* v. *Wiman, supra,* at 65 (5th Cir. 1962): "Those same cases, however, and others, recognize a positive, affirmative duty on the part of the jury commissioners and other state officials. . . ."

Conscious or intentional failure of jury commissioners to carry out their duties, or evil motive, or lack of good faith, is not necessary for a system to be unconstitutional in its operation.

—*Vanleeward* v. *Rutledge,* 369 F.2d 584, 586 (5th Cir. 1966). "It is not necessary to determine that any of the

commissioners, consciously or intentionally, failed to carry out the duties of their office, to conclude that the jury list from which the panel that tried Vanleeward was selected was totally defective."

—*United States ex rel. Seals* v. *Wiman, supra,* at 65. "[I]t is not necessary to go so far as to establish ill will, evil motive, or absence of good faith, but objective results are largely to be relied on in the application of the constitutional test."

The consequences of the discrimination resulting from failure to seek out and become acquainted with the qualifications of Negroes were described in *Smith* v. *Texas, supra,* at 132, 61 S.Ct. at 166, 85 L.Ed. at 87. "Where jury commissioners limit those from whom grand juries are selected to their own personal acquaintance, discrimination can arise from commissioners who know no negroes as well as from commissioners who know but eliminate them. If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand."

Alabama is among the most enlightened of the states in requiring that broadly inclusive community lists be consulted and that all eligible persons be shown on the rolls.[13] The purpose of the Alabama system is to insure that the jury roll is a cross-section of the community. *White* v. *Crook, supra; Mitchell* v. *Johnson, supra.* Compliance with selection procedures set by a state legislature does not necessarily meet constitutional standards. But if a jury selection system as provided by the Alabama statutes is

[13] *See* Note, *The Congress, The Courts and Jury Selection: A Critique of Titles I and II of the Civil Rights Bill of 1966,* 52 Va. L. Rev. 1069, 1079 n. 54 (1966).

fairly and efficiently administered, without discrimination and in substantial compliance with the state statutes—which the state courts of Alabama already require—the odds are very high that it will produce a constitutional result of a jury fairly representative of the community. Failure to comply with state procedures does not necessarily produce an unconstitutional exclusion. But the fact of, and the extent of, the failure in this case to comply with the procedures and the results contemplated by the Alabama system is strong evidence of unconstitutionality.

The selection procedures are not validated by the fact that traditionally the system always has been that way, or that the clerk and the commissioners are in effect persons who as a public service contribute their time and effort, or that funds are not provided for the commission to operate in the manner directed by the state statutes and required by constitutional standards.

We hold that Negro citizens of Greene County are discriminatorily excluded from consideration for jury service, in violation of the equal protection clause of the Fourteenth Amendment, and that Tit. 30, §21 has been unconstitutionally applied as to them. We hold also that the discriminatory exclusion of Negroes is, as to the plaintiffs Bokulich, Brown and Greene, a violation of both equal protection and due process.

5.

The attack on racial composition of the commission fails for want of proof. No proof was adduced except that the commission in Greene County now is and for many years has been composed entirely of white men appointed by the governor.[14]

---

[14] Cf. Clay v. United States, 5 Cir., —— F.2d —— [No. 24,991, May 6, 1968].

The statutory criteria in §21 of good character, honesty, intelligence, integrity, sound judgment and sobriety are attacked as facially unconstitutional for vagueness. Many states join Alabama in some of these requirements and in excluding convicted felons.[15] The Supreme Court has not held criteria such as these void for vagueness in the selection of jurors. And it has recognized the validity of wide discretion in jury commissioners. *Cassell* v. *Texas, supra; Franklin* v. *South Carolina,* 218 U.S. 161, 30 S.Ct. 640, 54 L.Ed. 980 (1910). We decline to hold §21 unconstitutional on its face.

Sec. 4, providing, "Any person who appears to the court to be unfit to serve on the jury, may be excused on his own motion, or at the instance of either party," also is alleged to be unconstitutional on its face. No reason, argument or authority is advanced in support of this allegation, and we decline to hold it facially unconstitutional.

The prayer that prosecutors be required not to reject jurors in exercise of peremptory challenges on account of race is denied. *Swain* v. *Alabama, supra.*

6. Relief

The plaintiff Head and the class which he represents are entitled to an injunction against discriminatory exclusion of Negroes from consideration for jury service in Greene County. In *Coleman* v. *Barton, supra,* in 1964 the single district judge stayed his hand and entered only a declaratory judgment. His abstention from granting injunctive relief was based in part on the fact that the general relief sought of him by Coleman as one of the plaintiffs encompassed the specific relief contemporaneously sought by

[15] *See* Note, *supra* note 13, at 1073-74 n. 25-28.

Coleman in state courts and the state courts should not be interfered with in their determination. In the judgment in that case the judge expressly left the door open for future injunctive relief, i.e., "[R]elief by way of injunction be and the same is thereby denied, but without prejudice as to future injunctive relief by further application herein or in any other proceedings." The declaration of rights and duties then made had not, as of January, 1967 produced a jury roll or a jury selection system meeting constitutional standards or purporting in real substance to carry out the mandate of the Alabama legislature. Coleman's litigation is now at an end. The plaintiffs in this case include Head as representative of the same general class as the plaintiffs other than Coleman in *Coleman* v. *Barton.* There is no occasion for further withholding of injunctive relief that will run to the benefit of other plaintiffs in *Coleman* v. *Barton* and in this case, and to which they are entitled.

The normal and most appropriate method for Bokulich, Brown and Greene to raise the composition of the jury roll and the operation of the jury selection system is in criminal prosecutions in the state courts, if indictments issue. *Stefanelli* v. *Minard,* 342 U.S. 117, 123, 72 S.Ct. 118, 121, 96 L.Ed. 138, 144 (1951); *Douglas* v. *City of Jeannette,* 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324 (1943). Their requests for injunctive relief will be denied.

The motion of the defendants to dismiss and the objections to the intervention by Brown and George Greene are to be overruled and denied. Dismissal on the merits will be entered as to all defendants other than the members and the clerk of the jury commission.

The attention of the defendants is directed to *Mitchell* v. *Johnson,* 250 F. Supp. 117(M.D. Ala. 1966), and to the

recently decided case of *Turner* v. *Fouche et al.*, C.A. No. 1357, S.D. Ga., Aug. 1968. In *Mitchell* the jury commissioners of Macon County, Alabama, were directed to abandon the jury roll, and to compile a new jury roll in strict accordance with the law of Alabama and the applicable constitutional principles. The court pointed out the necessity of the clerk's compiling the master list directed by §18 and of the commission's employing the sources of information which the Alabama statutes direct by employed, so as to compile on an objective basis a list as complete as possible, and then to apply thereto the subjective standards of §21—good character, sound judgment, ability to read English, etc.—fairly and objectively to all in a nondiscriminatory manner and without regard to race.

In *Turner* the jury commissioners of Taliaferro County, Georgia, a predominantly rural county comparable to Greene County, were informed by the court that the jury was illegally constituted because of exclusion of Negroes. Without the necessity of further orders of the court the county officials recomposed the jury list and reported to the court the results. The jury commissioners gave separate consideration to the name of every potentially eligible juror. If they lacked information about a particular individual they made inquiry in the community. Inquiries about Negroes were made of Negroes. Responsible Negroes were called upon to assist, and did assist, the jury commissioners. Specific eliminations were made based on poor health, citizens who were away from the county most of the time, persons requesting that they not be considered, persons about whom no information was available, and persons rejected as not conforming to the statutory standards of being intelligent and upright citizens. A Negro was appointed as clerk to the commission until such time

as a Negro or Negroes could be appointed to membership.

Attention also is directed to the personal survey method employed by the jury board of Jefferson County, Alabama. *Billingsley* v. *Clayton*, 359 F.2d 13 (5th Cir. 1966).

Judgment will be entered in accordance with this opinion.

DONE this the 13 day of September, 1968.

/s/ JOHN C. GODBOLD
United States Circuit Judge

/s/ H. H. GROOMS
United States District Judge

/s/ C. W. ALLGOOD
United States District Judge

A TRUE COPY

WILLIAM E. DAVIS, *Clerk*
United States District Court
Northern District of Alabama

By: /s/ MARGARET M. HOEHN
Deputy Clerk

Judgment

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ALABAMA,

WESTERN DIVISION

Civil Action No. 66-562

PAUL M. BOKULICH, WILLIE CARTER, SR., JOHN HEAD, REV. PERCY MCSHAN, on their own behalf and on behalf of all others similarly situated,

Plaintiffs,

—and—

GEORGE GREENE and HUBERT G. BROWN,

Intervenors-Plaintiffs,

—v.—

JURY COMMISSION OF GREENE COUNTY, ALABAMA, WALTER MORROW, ALBERT GRAY, and MELVIN DURRETTE, as members of the Jury Commission of Greene County, Alabama, MARY C. YARBOROUGH, as Clerk of the Jury Commission of Greene County, Alabama, E. F. HILDRETH, as Circuit Judge for the 17th Judicial District of Alabama, T. H. BOGGS, as District Attorney for Greene County, Alabama, RALPH BANKS, JR., as County Attorney for Greene County, Alabama, and LURLENE B. WALLACE, as Governor of the State of Alabama,

Defendants.

Judgment

Pursuant to the opinion filed in this case in lieu of formal findings of fact and conclusions of law under Rule 52, Fed. R. Civ. P.,

It is ORDERED, ADJUDGED, DECLARED and DECREED as follows:

1. There is systematic exclusion of Negroes from the jury rolls of Greene County, Alabama, by reason of purposeful discrimination, in violation of the Fourteenth Amendment to the Constitution of the United States.

2. Tit. 30, §21, Code of Alabama (1958), as amended, establishing qualifications for jurors, has been unconstitutionally applied to Negroes of Greene County, Alabama.

3. The motion to dismiss by defendants is overruled and denied. The intervention of George Greene and Hubert G. Brown is allowed and the objections thereto are overruled and denied.

4. The prayer of plaintiffs Paul M. Bokulich and plaintiffs-intervenors George Greene and Hubert G. Brown for injunction forbidding the grand jury of Greene County, Alabama, to consider criminal charges against them is denied.

5. The prayer that prosecutors in the Circuit Court of Greene County, Alabama, be enjoined from exercising peremptory challenges against jurors on account of race is denied.

6. The prayer that Tit. 30, §21, Code of Alabama (1958), as amended, and Tit. 20, §4, of said code, be declared unconstitutional on their face is denied.

7. The prayer that the jury commission of Greene County, Alabama, be declared constituted in an unconstitutional manner is denied.

8. This action is dismissed on the merits as to defendants E. F. Hildreth, as Circuit Judge; Lurlene B. Wallace, as Governor; T. H. Boggs, as District Attorney; and Ralph Banks, Jr., as County Attorney.

9. The defendants Walter Morrow, Albert Gray and Melvin Durrette, as members, and Mary C. Yarborough, as clerk, of the jury commission of Greene County, Alabama, and their successors in office, are hereby restrained and enjoined from systematically excluding Negroes from the jury roll of Greene County, Alabama, and from applying Tit. 30, §21, Code of Alabama (1958), as amended, to Negroes in a manner other and different from the manner in which applied to whites. The said defendants are ordered to take prompt action to compile a jury list for Greene County, Alabama, in accordance with the laws of Alabama and the constitutional principles set out in this judgment and in the opinion of the court entered this date. They are ordered to file with this court within sixty days a jury list as so compiled, showing thereon the information required by Tit. 30, §20, Code of Alabama (1958), as amended, plus the race of each juror, and if available the age of each juror, and a report setting forth the procedures, system and method by which said list was compiled and by which in the compilation thereof the qualifications for jurors, and the exclusions from jury service, provided by the laws of Alabama were applied to adult citizens of the county.

Judgment

10. The costs of this action to date are taxed against the defendants named in paragraph 9.

DONE, this the 13 day of September, 1968.

/s/ JOHN C. GODBOLD
United States Circuit Judge

/s/ H. H. GROOMS
United States District Judge

/s/ C. W. ALLGOOD
United States District Judge

A TRUE COPY

WILLIAM E. DAVIS, *Clerk*
United States District Court
Northern District of Alabama

By: /s/ MARGARET M. HOEHN
Deputy Clerk

Statutory Provisions Involved

The following additional provisions are material to an understanding of the issues presented.

Code of Alabama, Tit. 30, § 9. Membership, etc., of commissions.—Each of said jury commissions shall be composed of three members who shall be qualified electors of the county in which they are appointed and shall be men reputed for their fairness, impartiality, integrity and good judgment. Members of the commission shall not during the term for which they are appointed and during their tenure in said office hold any other office by appointment or election or perform any other public duty under the federal, state, county or municipal government, which carries with it any compensation whatsoever. (1939, p. 86.)

Code of Alabama, Tit. 30, § 10. Members to be appointed by governor.—The governor shall appoint the members of the several jury commissions who shall constitute said several commissions during the governor's tenure of office and until their successors are appointed and qualified, and thereafter the governor shall appoint the members of said jury commissions for and only during the tenure of office of the governor making the appointment and until their successors are appointed and qualified. (1939, p. 86.)

Code of Alabama, Tit. 30, § 18. Duties of Clerk.—The clerk of the jury commission shall, under the direction of the jury commission obtain the name of every male citizen of the county over twenty-one and under sixty-five years of age and their occupation, place of residence and place of business, and shall perform all such other duties required of him by law under the direction of the jury commission. (1939, p. 86.)

Statutory Provisions Involved

Code of Alabama, Tit. 30, § 20. Jury roll and cards.—The jury commission shall meet in the court house at the county seat of the several counties annually, between the first day of August and the twentieth day of December, and shall make in a well bound book a roll containing the name of every male citizen living in the county who possessed the qualifications herein prescribed and who is not exempted by law from serving on juries. The roll shall be arranged alphabetically and by precincts in their numerical order and the jury commission shall cause to be written on the roll opposite every name placed thereon the occupation, residence and place of business of every person selected, and if the residence has a street number it must be given. Upon the completion of the roll the jury commission shall cause to be prepared plain white cards all of the same size and texture and shall have written or printed on the cards the name, occupation, place of residence and place of business of the person whose name has been placed on the jury roll; writing or printing but one person's name, occupation, place of residence and of business on each card. These cards shall be placed in a substantial metal box provided with a lock and two keys, which box shall be kept in a safe or vault in the office of the probate judge, and if there be none in that office, the jury commission shall deposit it in any safe or vault in the court house to be designated on the minutes of the commission; and one of said keys thereof shall be kept by the president of the jury commission. The other of said keys shall be kept by a judge of a court of record having juries, other than the probate or circuit court, and in counties having no such court then by the judge of the circuit court, for the sole use of the judges of the courts of said county needing jurors. The jury roll shall be kept

securely and for the use of the jury commission exclusively. It shall not be inspected by anyone except the members of the commission or by the clerk of the commission upon the authority of the commission, unless under an order of the judge of the circuit court or other court of record having jurisdiction. (1939, p. 86; 1945, p. 496, appvd. July 7, 1945.)

Code of Alabama, Tit. 30, § 24. Duty of commission to fill jury roll; procedure; etc.—The jury commission is charged with the duty of seeing that the name of every person possessing the qualifications prescribed in this chapter to serve as a juror and not exempted by law from jury duty, is placed on the jury roll and in the jury box. The jury commission must not allow initials only to be used for a juror's name but one full Christian name or given name shall in every case be used and in case there are two or more persons of the same or similar name, the name by which he is commonly distinguished from the other persons of the same or similar name shall also be entered as well as his true name. The jury commission shall require the clerk of the commission to scan the registration lists, the lists returned to the tax assessor, any city directories, telephone directories and any and every other source of information from which he may obtain information, and to visit every precinct at least once a year to enable the jury commission to properly perform the duties required of it by this chapter. In counties having a population of more than one hundred and eighteen thousand and less than three hundred thousand, according to the last or any subsequent federal census, the clerk of the jury commission shall be allowed an amount not to exceed fifty dollars per calendar year to defray his expenses in

the visiting of these precincts, said sum or so much thereof as is necessary to be paid out of the respective county treasury upon the order of the president of the jury commission. (1939, p. 86.)

Code of Alabama, Tit. 30, § 30:

"At any session of a court requiring jurors for the next session, the judge, or where there are more than one, then any one of the judges of the court shall draw from the jury box in open court the names of not less than fifty persons to supply the grand jury for such session and petit juries for the first week of such session of the court, or if a grand jury is not needed for the session at least thirty persons, and as many more persons as may be needed for jury service in courts having more than one division for the first week, and after each name is drawn it shall not be returned to the jury box, and there shall be no selection of names, and must seal up the names thus drawn, and retain possession thereof, without disclosing who are drawn until twenty days before the first day of the session of the court for which the jurors are to serve, when he shall forward these names by mail or express, or hand the same to the clerk of the court who shall thereupon open the package, make a list of the names drawn, showing the day on which the jurors shall appear and in what court they shall serve, and entering opposite every name the occupation of the person, list place of business, and of residence, and issue a venire containing said names and information to the sheriff who shall forthwith summon the persons names thereon to appear and serve as jurors"